

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

| | | |
|------------------------------------|---|--------------------------------|
| THE AGAVE PROJECT LLC, d/b/a |) | |
| THORNTAIL, and JOEL VANDENBRINK, |) | No. 23-1984 |
| INDIVIDUAL, |) | |
| Plaintiff, |) | |
| v. |) | DECLARATION OF MITCHELL D. |
| |) | WEST IN SUPPORT OF PLAINTIFFS' |
| |) | MOTION FOR TEMPORARY |
| HOST MASTER / 1337 SERVICES LLC, a |) | RESTRAINING ORDER AND |
| ST. KITTS and NEVIS COMPANY, and a |) | ORDER AUTHORIZING |
| DOE, |) | ALTERNATE SERVICE AND |
| |) | EXPEDITED DISCOVERY AND |
| Defendants. |) | REQUIRING DEFENDANTS TO |
| |) | SHOW CAUSE RE PRELIMINARY |
| |) | INJUNCTION |

I, Mitchell D. West, hereby states and declare as follows:

1. I am one of the attorneys representing Plaintiffs, The Agave Project LLC, d/b/a Thorntail and Joel VandenBrink, in the above-captioned matter. I make the following statements based on personal knowledge. If called to testify about these matters, I am competent and willing to do so.

2. Attached as Exhibit 1 is a copy of the Uniform Domain-Name Dispute-Resolution Policy ("UDRP") Decision entered in connection with Plaintiffs' request to transfer the thorntailhardagave.com domain (the "Infringing Domain") to them.

3. Through the UDRP process, the arbitration organization, Forum Alternative Dispute Resolution, mandated that Tucows Domains Inc. ("Tucows") identify the registrant

DECLARATION OF MITCHELL D. WEST - 1

LOWE GRAHAM JONES PLLC


1325 Fourth Avenue, Ste. 1130
Seattle, Washington 98101
206.381.3300 • F: 206.381.3301

of the Infringing Domain, in compliance with Internet Corporation for Assigned Names and Numbers (“ICANN”) policies that Tucows had agreed to as a registrar. Tucows identified Defendant Host Master / 1337 Services LLC (“Host Master 1337”) as the registrant and identified P.O. Box 590 Springates East, Government Road, Charlestown, Nevis, KN, as the mailing address for Host Master 1337. Tucows did not identify a physical business address where personal service could be attempted on Host Master 1337.

4. In response to the mandate from Forum Alternative Dispute Resolution Tucows also identified whois+thorntailhardagave.com@njal.la as the email address associated with Host Master 1337’s registration of the thonrtailhardagave.com domain.

5. Tucows, Whois Privacy Corp., and Cloudflaire, Inc. each have been identified based on public-domain-registration information related to “thorntailhardagave.com,” “kompletedesignbuild.com,” and “anonimcard.com” as having provided services related to one or more of the websites hosing defamatory content about Plaintiffs. Attached as **Exhibit 2** are copies of the public-domain-registration information associated with each website.

6. It is common practice for Host Master 1337 to fail to submit a response to UDRP actions initiated against domains they registered. *See e.g. Google LLC v. Host Master / 1337 Services LLC*, Claim Number: FA2103001935183 (<https://www.adrforum.com/DomainDecisions/1935183.htm>). And according to DNDisputes.com, the vast majority of cases against Host Master 1337 resulted in the domain being transferred. *See* <https://www.dndisputes.com/case/respondent/host-master-1337-services-llc/?page=1>.

I swear under penalty of perjury under the laws of the United States that the statements in this declaration are true and correct to the best of my recollection.

EXECUTED at Seattle, Washington, on this 26th day of December 2023.

/s/ Mitchell D. West
Mitchell D. West

DECLARATION OF MITCHELL D. WEST - 2

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EXHIBIT 1



DECISION

The Agave Project LLC DBA Thorntail. v. Host Master / 1337 Services LLC

Claim Number: FA2311002070610

PARTIES

Complainant is **The Agave Project LLC DBA Thorntail**. (“Complainant”), represented by **Mark Walters** of **Lowe Graham Jones PLLC**, Washington, USA. Respondent is **Host Master / 1337 Services LLC** (“Respondent”), St. Kitts and Nevis.

REGISTRAR AND DISPUTED DOMAIN NAME

The domain name at issue is **<thorntailhardagave.com>**, registered with **Tucows Domains Inc.**

PANEL

The undersigned certifies that he has acted independently and impartially and to the best of his knowledge has no known conflict in serving as Panelist in this proceeding.

Debrett G. Lyons as Panelist.

PROCEDURAL HISTORY

Complainant submitted a Complaint to FORUM electronically on November 10, 2023; FORUM received payment on November 10, 2023.

On November 13, 2023, Tucows Domains Inc. confirmed by e-mail to FORUM that the <**thorntailhardagave.com**> domain name is registered with Tucows Domains Inc. and that Respondent is the current registrant of the name. Tucows Domains Inc. has verified that Respondent is bound by the Tucows Domains Inc. registration agreement and has thereby agreed to resolve domain disputes brought by third parties in accordance with ICANN's Uniform Domain Name Dispute Resolution Policy (the "Policy").

On November 14, 2023, FORUM served the Complaint and all Annexes, including a Written Notice of the Complaint, setting a deadline of December 4, 2023 by which Respondent could file a Response to the Complaint, via e-mail to all entities and persons listed on Respondent's registration as technical, administrative, and billing contacts, and to postmaster@thorntailhardagave.com. Also on November 14, 2023, the Written Notice of the Complaint, notifying Respondent of the e-mail addresses served and the deadline for a Response, was transmitted to Respondent via post and fax, to all entities and persons listed on

Respondent's registration as technical, administrative and billing contacts.

Having received no response from Respondent, FORUM transmitted to the parties a Notification of Respondent Default.

On December 5, 2023, pursuant to Complainant's request to have the dispute decided by a single-member Panel, FORUM appointed Debrett G. Lyons as Panelist.

Having reviewed the communications records, the Administrative Panel (the "Panel") finds that FORUM has discharged its responsibility under Paragraph 2(a) of the Rules for Uniform Domain Name Dispute Resolution Policy (the "Rules") "to employ reasonably available means calculated to achieve actual notice to Respondent" through submission of Electronic and Written Notices, as defined in Rule 1 and Rule 2. Therefore, the Panel may issue its decision based on the documents submitted and in accordance with the ICANN Policy, ICANN Rules, FORUM's Supplemental Rules and any rules and principles of law that the Panel deems applicable, without the benefit of any response from Respondent.

RELIEF SOUGHT

Complainant requests that the domain name be transferred from Respondent to Complainant.

PARTIES' CONTENTIONS

A. Complainant

Complainant asserts common law trademark rights in THORNTAIL HARD AGAVE and submits that the domain name is confusingly similar to its trademark.

Complainant alleges that Respondent has no rights or legitimate interests in the disputed domain name.

Complainant alleges that Respondent registered and used the disputed domain name in bad faith having targeted Complainant's business.

B. Respondent

Respondent failed to submit a Response in this proceeding.

FINDINGS

The factual findings pertinent to the decision in this case are that:

1. Complainant was incorporated in March, 2023, with the intention of making and supplying hard agave, an alcoholic beverage produced from fermented agave syrup.
2. the appointed CEO of Complainant is Joel VandenBrink, who has worked in the alcoholic beverage space and brewing industry since 2007; and
3. the disputed domain name was registered on May 6, 2023, and has been used to criticise Mr. VandenBrink.

DISCUSSION

Paragraph 15(a) of the Rules instructs this Panel to "decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."

Paragraph 4(a) of the Policy requires that Complainant must prove each of the following three elements to obtain an order that a domain name should be cancelled or transferred:

- (1) the domain name registered by Respondent is identical or confusingly similar to a trademark or service mark in which Complainant has rights; and

- (2) Respondent has no rights or legitimate interests in respect of the domain name; and
- (3) the domain name has been registered and is being used in bad faith.

Trademark Rights / Identical or Confusingly Similar

Paragraph 4(a)(i) of the Policy requires a two-fold enquiry—a threshold investigation into whether a complainant has rights in a trademark, followed by an assessment of whether the disputed domain name is identical or confusingly similar to that trademark.

Proof of a trademark registered with a national authority is evidence of trademark rights (see, for example, *Mothers Against Drunk Driving v. phix*, FA 174052 (FORUM Sept. 25, 2003)) but here Complainant asserts (unregistered) common law trademark rights in THORNTAIL HARD AGAVE. Nevertheless, it is well established by decisions under this Policy that a complainant is equally entitled to prove common law trademark rights (see, for example, *Mar-Lou Shoes, Inc. v. bo pam*, FA 2039849 (FORUM May 16, 2023): “There is no requirement under the UDRP that a complainant must show registration of a trademark to demonstrate its rights therein. Rights may be shown by persuasive evidence of common law trademark rights in a mark.”

The Complaint states that:

‘While the UDRP makes no specific reference to the date on which the holder of the trademark or service mark acquired its rights, such rights must be in existence at the time the complaint is filed. Complainant has accrued its rights by offering for sale, securing an agreement for distribution, and continuing to market and promote since at least as early as March 2023, its hard beverage products under the brand name THORNTAIL HARD AGAVE. For example, in March 2023, the Complainant provided samples of its hard beverage products made under the brand name THORNTAIL HARD AGAVE to Columbia Distributing of Kent, Washington, resulting in an agreement to purchase and take delivery for resale certain quantities of the branded beverage in late December or early January 2024. Such marketing, advertising, sampling, and agreements for future resale and distribution of Complainant’s hard beverage under its brand constitutes use under the Lanham Act.’

...

Beginning in March of 2023 Complainant took steps to develop its THORNTAIL HARD AGAVE beverage brand including, having conducted an FDA Nutritional Analysis of the THORNTAIL HARD AGAVE beverage (March, 2023); drafting a Business Plan–Executive Summary (March 2023); Working on brand development with a

company called Digital Vendetta (March 2023) and Investment Presentations (May 2023) and (June 2023). During this period Complainant disclosed the brand development of its beverage under the THORNTAIL HARD AGAVE. Thereafter, Complainant began discussions with its director to make placement of the THORNTAIL HARD AGAVE into Kroger grocery stores as a “fi[r]st in nation” placement for delivery in early January 2024.

The material accompanying the Complaint comprises two lengthy documents, one essentially an extended CV of Complainant’s CEO, the other a detailed marketing and promotion plan.

Common law trademark rights must be proven through public use and public recognition of the mark such that it has come to acquire secondary meaning. In *Marquette Golf Club v. Al Perkins*, FA 1738263 (FORUM July, 27, 2017) the panel found that complainant had established common law rights in the MARQUETTE GOLF CLUB mark with evidence of secondary meaning, including “longstanding use; evidence of holding an identical domain name; media recognition; and promotional material/advertising.” (see also, by way of example, *Goodwin Procter LLP v. Amritpal Singh*, FA 1736062 (FORUM July 18, 2017) holding that complainant demonstrated its common law rights in the GOODWIN mark through evidence of “long time continuous use of the mark, significant related advertising

expenditures, as well as other evidence of the mark's having acquired secondary meaning.”; *Copper Wire Stripper Limited v. Joe Williams / BLUEDOGINTERNATIONALINC*, FA 1604460 (FORUM Apr. 4, 2015) finding complainant failed to establish secondary meaning where no evidence was provided with respect to sales under the mark and money spent promoting the mark; *CW & Associates Consulting and Recruiting Inc. v. Lynda Pitchford / ITSr*, FA 1619758 (FORUM June 29, 2015) (finding complainant failed to establish common law rights, stating, “Complainant has failed to provide evidence of any sales figures or advertising expenditures or any indication of the extent of use aside from what may be implied from the business name registration and placement of the name(s) on social media. There is no evidence to show that the public is aware of the claimed marks at all, much less a public association of the claimed ETS marks with the Complainant. Mere use of social media alone is not acceptable proof of secondary meaning, a/k/a/ acquired distinctiveness, in the mind of the general public.”).

The WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (“the WIPO Overview”)ⁱ, asks at paragraph 1.3: “*What does a complainant need to show to successfully assert unregistered or common law trademark rights?*” The consensus viewpoint of panelists includes the following statements:

“Relevant evidence demonstrating such acquired distinctiveness (also referred to as secondary meaning) includes a range of factors such as (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, (iv) the degree of actual public (e.g., consumer, industry, media) recognition, and (v) consumer surveys.

...

Specific evidence supporting assertions of acquired distinctiveness should be included in the complaint; conclusory allegations of unregistered or common law rights, even if undisputed in the particular UDRP case, would not normally suffice to show secondary meaning.”

The marketing and other material submitted in support of the Complaint clearly shows a commitment to use the trademark (and may indeed show first use of the mark if that were the issue) but it does not establish public reputation. Almost all of the material shows (genuine) preparatory steps to market, and may even point to test sales, but it does not show secondary meaning whatsoever and so does not establish common law trademark rights.

The Panel finds accordingly that Complainant has not satisfied the requirements of paragraph 4(a)(i) of the Policy.

Rights or Legitimate Interests

No findings required (see, for example, *Netsertive, Inc. v. Ryan Howard / Howard Technologies, Ltd.*, FA 1721637 (FORUM Apr. 17, 2017) finding that because the complainant must prove all three elements under the Policy, the complainant's failure to prove one of the elements makes further inquiry into the remaining element unnecessary); *Wasatch Shutter Design v. Duane Howell / The Blindman*, FA 1731056 (FORUM June 23, 2017) deciding not to inquire into the respondent's rights or legitimate interests or its registration and use in bad faith where the complainant could not satisfy the requirements of Policy ¶ 4(a)(i)).

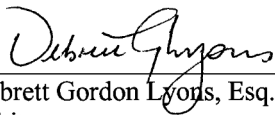
Registration and Use in Bad Faith

No findings required.

DECISION

Having not established one of the elements required under the ICANN Policy, the Panel concludes that relief shall be **DENIED**.

Accordingly, it is Ordered that the <**thorntailhardagave.com**> domain name **REMAIN WITH** Respondent.


Debrett Gordon Lyons, Esq.
Arbitrator

Debrett G Lyons, Panelist

Dated: December 12, 2023

ⁱ See <http://www.wipo.int/amc/en/domains/search/overview3.0>

EXHIBIT 2

ICANN | LOOKUP (/en)

Registration data lookup tool

Enter a domain name or an Internet number
resource (IP Network or ASN)

[Frequently Asked Questions](#)
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anonimcard.com

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Domain Information

Name: ANONIMCARD.COM

Registry Domain ID: 2796211236_DOMAIN_COM-VRSN

Domain Status:

[clientTransferProhibited](https://icann.org/epp#clientTransferProhibited) (<https://icann.org/epp#clientTransferProhibited>)

[clientUpdateProhibited](https://icann.org/epp#clientUpdateProhibited) (<https://icann.org/epp#clientUpdateProhibited>)

Nameservers:

1-YOU.NJALLA.NO

2-CAN.NJALLA.IN

3-GET.NJALLA.FO

Dates

Registry Expiration: 2024-07-06 03:55:36 UTC

Updated: 2023-07-06 03:55:37 UTC

Created: 2023-07-06 03:55:36 UTC

Contact Information

Registrant:

Kind: individual

Mailing Address: Charlestown, KN

Contact Uri: <https://tieredaccess.com/contact/36f80615-9bf2-4847-a0bf-6455033edb00> (<https://tieredaccess.com/contact/36f80615-9bf2-4847-a0bf-6455033edb00>)

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Technical:

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Billing:

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Registrar Information

Name: TUCOWS, INC.

IANA ID: 69

Abuse contact email: domainabuse@tu cows.com

Abuse contact phone: tel:+1.4165350123

Reseller Information

Name: 1337 Services LLC

DNSSEC Information

Delegation Signed: Unsigned

Authoritative Servers

Registry Server URL: <https://rdap.verisign.com/com/v1/domain/anonimcard.com> (<https://rdap.verisign.com/com/v1/domain/anonimcard.com>).

Last updated from Registry RDAP DB: 2023-12-26 19:54:00 UTC

Registrar Server URL: <https://opensrs.rdap.tucows.com/domain/ANONIMCARD.COM> (<https://opensrs.rdap.tucows.com/domain/ANONIMCARD.COM>).

Last updated from Registrar RDAP DB: 2023-07-06 04:12:14 UTC

Notices and Remarks

Remarks:

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Notices:

Status Codes

For more information on domain status codes, please visit <https://icann.org/epp>
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RDDS Inaccuracy Complaint Form

URL of the ICANN RDDS Inaccuracy Complaint Form: <https://icann.org/wicf>
<https://icann.org/wicf> (<https://icann.org/wicf>).

Terms of Service

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This information is provided "as is" and does not guarantee its accuracy.

By submitting a query, you certify that you have a legitimate purpose for requesting the data, that you will use this data only for lawful purposes and delete the data immediately when the data are no longer necessary for your lawful or legitimate purpose, and that, under no circumstances, will you use this data to: a) allow, enable, or otherwise support the transmission of mass, unsolicited, commercial advertising, or solicitations to entities other than the data recipient's own existing customers; or (b) enable high volume, automated, electronic processes that send queries or data to the systems of any registry operator or ICANN-accredited registrar, except as reasonably necessary to register domain names or modify existing registrations.

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thorntailhardagave.com

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Domain Information

Name: THORNTAILHARDAGAVE.COM

Registry Domain ID: 2778543452_DOMAIN_COM-VRSN

Domain Status:

[clientTransferProhibited](https://icann.org/epp#clientTransferProhibited) (<https://icann.org/epp#clientTransferProhibited>)

[clientUpdateProhibited](https://icann.org/epp#clientUpdateProhibited) (<https://icann.org/epp#clientUpdateProhibited>)

Nameservers:

1-YOU.NJALLA.NO

2-CAN.NJALLA.IN

3-GET.NJALLA.FO

Dates

Registry Expiration: 2024-05-06 08:30:00 UTC

Updated: 2023-05-06 08:30:01 UTC

Created: 2023-05-06 08:30:00 UTC

Contact Information

Registrant:

Kind: individual

Mailing Address: Charlestown, KN

Contact Uri: <https://tieredaccess.com/contact/77f3f195-1ef8-4ce0-bc9e-cfef7f7ca9d0> (<https://tieredaccess.com/contact/77f3f195-1ef8-4ce0-bc9e-cfef7f7ca9d0>)

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Name: TUCOWS, INC.

IANA ID: 69

Abuse contact email: domainabuse@tu cows.com

Abuse contact phone: tel:+1.4165350123

Reseller Information

Name: 1337 Services LLC

DNSSEC Information

Delegation Signed: Unsigned

Authoritative Servers

Registry Server URL: <https://rdap.verisign.com/com/v1/domain/thorntailhardagave.com> (<https://rdap.verisign.com/com/v1/domain/thorntailhardagave.com>)

Last updated from Registry RDAP DB: 2023-12-26 19:41:26 UTC

Registrar Server URL: <https://opensrs.rdap.tucows.com/domain/THORNTAILHARDAGAVE.COM> (<https://opensrs.rdap.tucows.com/domain/THORNTAILHARDAGAVE.COM>)

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Domain Information

Name: KOMPLETEDESIGNBUILD.COM

Registry Domain ID: 2038352748_DOMAIN_COM-VRSN

Domain Status:

[clientTransferProhibited](https://icann.org/epp#clientTransferProhibited) (<https://icann.org/epp#clientTransferProhibited>)

Nameservers:

GLEN.NS.CLOUDFLARE.COM

JEWEL.NS.CLOUDFLARE.COM

Dates

Registry Expiration: 2024-06-29 18:33:00 UTC

Updated: 2023-05-08 04:17:03 UTC

Created: 2016-06-29 18:33:00 UTC

Contact Information

Registrant:

Name: DATA REDACTED

Organization: DATA REDACTED

Email: <https://domaincontact.cloudflareregistrar.com/kompletedesignbuild.com>

Whois Server: whois.cloudflare.com

Phone: tel:DATA REDACTED ext DATA REDACTED

Mailing Address: DATA REDACTED, DATA REDACTED, DATA REDACTED, AB, DATA REDACTED, CA

Administrative:

Name: DATA REDACTED

Organization: DATA REDACTED

Email: <https://domaincontact.cloudflareregistrar.com/kompletedesignbuild.com>

Whois Server: whois.cloudflare.com

Phone: tel:DATA REDACTED ext DATA REDACTED

Mailing Address: DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED

Technical:

Name: DATA REDACTED

Organization: DATA REDACTED

Email: <https://domaincontact.cloudflareregistrar.com/kompletedesignbuild.com>

Whois Server: whois.cloudflare.com

Phone: tel:DATA REDACTED ext DATA REDACTED

Mailing Address: DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED

Billing:

Name: DATA REDACTED

Organization: DATA REDACTED

Email: <https://domaincontact.cloudflareregistrar.com/kompletedesignbuild.com>

Whois Server: whois.cloudflare.com

Phone: tel:DATA REDACTED ext DATA REDACTED

Mailing Address: DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED, DATA REDACTED

Registrar Information

Name: Cloudflare, Inc.

IANA ID: 1910

Abuse contact email: registrar-abuse@cloudflare.com

Abuse contact phone: tel:+1.4153197517

DNSSEC Information

Delegation Signed: Unsigned

Authoritative Servers

Registry Server URL: <https://rdap.verisign.com/com/v1/domain/kompletedesignbuild.com> (<https://rdap.verisign.com/com/v1/domain/kompletedesignbuild.com>)

Last updated from Registry RDAP DB: 2023-12-26 19:51:45 UTC

Registrar Server URL: <https://rdap.cloudflare.com/rdap/v1/domain/KOMPLETEDESIGNBUILD.COM> (<https://rdap.cloudflare.com/rdap/v1/domain/KOMPLETEDESIGNBUILD.COM>)

Notices and Remarks

Notices:

Cloudflare Registrar

Cloudflare provides more than 13 million domains with the tools to give their global users a faster, more secure, and more reliable internet experience.

Register your domain name at <https://www.cloudflare.com/registrar/>

<https://www.cloudflare.com/registrar/> (<https://www.cloudflare.com/registrar/>)

Terms of Use

Data in the Cloudflare Registrar WHOIS database is provided to you by Cloudflare under the terms and conditions at <https://www.cloudflare.com/domain-registration-agreement/>.

By submitting this query, you agree to abide by these terms.

<https://www.cloudflare.com/domain-registration-agreement/> (<https://www.cloudflare.com/domain-registration-agreement/>)

EPP Status Codes

For more information on domain status codes, please visit <https://icann.org/epp>.

<https://icann.org/epp> (<https://icann.org/epp>).

Whois Inaccuracy Complaint Form

URL of the ICANN Whois Inaccuracy Complaint Form: <https://www.icann.org/wicf>.

<https://www.icann.org/wicf> (<https://www.icann.org/wicf>)



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